Splendid Isolation: International Humanitarian Law, Legal Theory and the International Legal Order*

Abstract

International humanitarian law (IHL) is one of the oldest and most distinctive sectors of the international legal order. IHL's historical development has been unique; from one of the original focal points of international law it has since become a highly specialised area, isolated from the broader international legal academic debate. The most obvious example of this isolation is the lack of discussion of the place of IHL in contemporary debates on the future of international law such as fragmentation and constitutionalisation. The reasons for this isolation are manifold, however, given IHL's position as a prime example of fragmentation and the issues it raises for constitutionalisation it is questionable whether these debates can be conclusive until they tackle the issues presented by this particular body of law. This 'splendid isolation' is detrimental to both the contemporary international legal debate and IHL.

Keywords

fragmentation, constitutionalisation, *lex specialis*, self-contained regimes, legal theory

1. Introduction

International humanitarian law (IHL), from both a historical and contemporary perspective, holds a unique position within the international legal order.[1] This distinctiveness is central to the main theme of this article: to assess the role of IHL, or *jus in bello*, in contemporary theoretical debates on the international legal order. IHL's presence in the legal theory literature is sparse. A partial explanation for this is to be found in a number of its unique characteristics that contribute to IHL's absence from this debate. These include its exceptional status within war and law, its historical development, its early codification and, most importantly for this analysis, its treatment within international legal theory.[2] In exploring these characteristics, this article seeks to further account for the near absence of IHL within current legal theory and to suggest that a more active engagement with IHL has the potential to enrich the debates on the future of the international legal order.

* Aoife O'Donoghue, Lecturer, Durham Law School, aoife.o'donoghue@durham.ac.uk. I would like to thank Colin Murray and the reviewers for their insightful comments on earlier drafts of this piece. All errors are my own.

[1] International humanitarian law and *jus in bello* are used interchangeably and are intended to mean the law of armed conflict, though some argue there are differences between them. Greenwood 2008, p 11

[2] Neff 2005

Contemporary debates on the nature and future of international law take several courses including, among others, fragmentation,[3] global legal pluralism,[4] cosmopolitanism,[5] and constitutionalisation.[6] These theories are innovative, albeit not entirely new understandings of the governance models between branches of international law. Several of these debates engage with the whole of public international law while others consider one particular field such as trade or human rights law. Nonetheless, even in sectoral theories the relationship between different fields of international law remains a core concern. These theories do not entirely depart from the theoretical questions which dominated the attention of the different schools of thought during the last century, but their contemporary character is important in understanding where IHL fits into the present debates on the future of international law.[7]

More specifically, this article considers the place of IHL in the fragmentation[8] and constitutionalisation debates.[9] These contrasting approaches, centring on questions of governance and the future workings of the international legal order, are prime examples of current academic exchanges. Fragmentation considers the relationships between general international law and its specialised areas. It also examines these specialised areas in the context of the process by which they are all becoming more inwardly focused and divergent from one another. In contrast, constitutionalisation considers the increasing move in the international legal order from a horizontal consent based system to a hierarchal order that maintains core constitutional norms in its operation. Depending on the form of fragmentation or constitutionalisation which is advocated, these are not mutually exclusive approaches. Nonetheless, their contrasting basic hypotheses allows for a broad discussion of the role of international humanitarian law within them and, as such, within contemporary discourse.

Jus ad bellum dominates as a central concern irrespective of theoretical approach, in particular in discussions on the role of the Security Council or in the rise of multilateralism. By contrast, its counterpart, *jus in bello*, receives little attention.[10] An overview of the contemporary literature suggests that IHL is often either largely ignored or granted only a hasty examination. Since other specialised areas such as trade or human rights receive extensive analysis, the 'specialisation' argument cannot fully account for why IHL is so often side-lined.[11] This lack of interaction may derive from several sources. The aforementioned specialisation of IHL, to the extent that many public international lawyers do not feel comfortable delving into its inner depths, provides one possible, albeit partial, explanation.

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[3] Koskenniemi and Leino 2002, Hafner 2003-2004, Simma 2003-2004, Buffard et al. 2008, Dupuy 1999, Benvenisti and Downs 2007-2008, ILC Fragmentation Report

[4] Wheatley 2010, Wheatley and Berman 2007, Kirsch 2010

[5] Domingo 2011, Kumm 2009, Pierik and Werner 2010, Feldman 2006, Benhabib 2006

[6] Klabbers et al. 2009 , Walker 2008 , Macdonald and Johnston 2005, Dunoff and Trachtman 2009, Fassbender 2009

[7] Positivism and the New Haven School are two such examples. McDougal 1953, McDougal et al. 1967-68, McDougal et al. 1987-1988, Hart 1965

[8] Koskenniemi, Leino 2002, Hafner 2003-2004, Simma 2003-2004, Buffard et al. 2008, Dupuy 1999, Benvenisti and Downs 2007-2008, ILC Fragmentation Report

[9] Klabbers et al. 2009, Walker 2008, Macdonald and Johnston 2005, Dunoff and Trachtman 2009, Fassbender 2009

[10] Fassbender 2009, p124 -125, 145-146, Tzanakópoulos 2011, p56-58

[11] Cass 2005, Petersmann 2008

This specialisation is in part driven by the dominance of certain forms of legal expertise, in particular, the military and the International Committee of the Red Cross (ICRC). The military, for obvious reasons, has a particular perspective and focus on IHL and further, has the resource necessary to command a complete understanding of all its rules. Similarly, the ICRC, with its competence driven by IHL treaty law, maintains a complete expertise. While military and ICRC opinion may not always correlate, their knowledge and competence, which extends to understanding all the rules of IHL, makes it difficult for those outside this realm to compete without being dismissed as ignorant of the entirety of the law and therefore not competent to comment.

The resulting discomfort of those international lawyers who lack comprehensive knowledge and thus are less likely to engage in discussions pertaining to theory and IHL is compounded by the fact that within IHL circles there does not appear to be an obvious concern with the wider on-going debates in public international law. This lack of enthusiasm may be due to the perception that IHL has largely settled its relationship with other bodies of international law through the development, for example, of the doctrine of *lex specialis*.[12] Yet, the dearth of IHL discourse in these broader governance deliberations cannot be understood on that basis alone, particularly as certain questions, such as the relationship with human rights continues to ignite extensive discussions and disagreements.

This article considers several differing perspectives on international humanitarian law. Public international law evolves to cope with new challenges. For example, the rise in intra-state conflicts and transnational terrorism both required a reconsideration of some traditional understandings of law's operation. However, IHL remains largely static and within the confines that more traditional academic voices would recognise as Westphalian international law. Of course, IHL's isolation could simply mean that it is insignificant to these debates; however, this particular position may be dismissed as an all too easy solution which, as this article will show, does not stand up to scrutiny.

This article seeks to confound comfortable claims regarding IHL's place in the international legal order and asks what contemporary debates tell us about this particular body of law in the 21st Century. As one of the originators of many of the core rules of public international law, from treaty interpretation to state responsibility, IHL is a prime example of how an area develops to become a fragmented sector of international law. On the other hand, it also appears to highlight the difficulties faced by a constitutionalisation process. Indeed, since it is staunchly traditional in its operation, it arguably provides an example of why public international law in the 21st century is largely unchanged from its 20th century form.

To consider the role played by IHL in contemporary legal debate, this paper will first give a brief account of how this body of law interacts with other aspects of international law. As with other specialist fields, IHL is not absolutely settled; nevertheless, it is possible to broadly outline its place within the international legal order. This article aims to set a firm basis for considering what current discussions on the future of public international law can tell us about IHL and vice versa. Following an examination of the interplay between IHL and

[12] Dunoff 2000, p 86

international law, this piece will turn to two thematic approaches that dominate current international legal discourse, namely, fragmentation and constitutionalisation. A brief outline of the parameters of both approaches is followed by an assessment of how each has engaged with IHL. The article concludes with some thoughts on how IHL could make a contribution to these debates. Ultimately, this article will discuss and propose how engagement from both ends of the spectrum would benefit international law and suggest why such connections should be encouraged.

2. International Humanitarian Law and the Development of Public International Law

An examination of the historical evolution of public international law suggests that, for the great preponderance of its existence, IHL formed a core part of its content. This is perhaps only to be expected since IHL's origins can be traced to ancient times and to a period prior to the arrival of public *inter-national* law which evolved out of a need to regulate the relations between the emerging nation-States.[13] Grotius, Gentilli, even Blackstone, all considered IHL, or the laws of war, as central to the character of international law. Indeed, arguably for the majority of the international legal order's history *jus in bello* combined with *jus as bellum* comprised the mass of international law. Some of the first international efforts to codify international law, such as the 1886 St. Petersburg Declaration, were entirely focused upon IHL.[14] Arguably, such codification was possible due to the body of customary law already in existence together with a willingness to negotiate on aspects that were considered vital but which had not, as yet, formed into customary law.[15] Yet, while just war theories and other elements of *jus ad bellum* waxed and waned, IHL remained steadfast, if not in its content, in its relevance and centrality to broader international law. Today, in contrast, IHL appears to be located on the periphery of public international law.

Contemporaneous to the codification of IHL, public international law began its ongoing exponential expansion.[16] The extent of the expansion of international law is evident in law school curriculums where public international law modules now merely introduce students to the basics of the system. Specialised courses on everything from trade, environment, human rights, international institutions and IHL provide the arena in which students learn the nuance of the practice which underpins the international legal order. This expansion inevitably has resulted in increased specialisation by both the academics and practitioners of international law. The role of both the military and the ICRC contribute greatly to this specialisation. These practitioners of IHL, entirely focused on this one area of law, are partially to blame for this trend, as their extensive knowledge, at times, prevents others occupied by international law to engage with the topic. Further, because IHL is only applicable in exceptional circumstances – in other words in times of armed conflict – it makes it safer for public

[13] Pictet 1985, p 5-25, see particularly, p15-16 on chivalry and its influence on the development of international law, see also Grotius 1646, Gentilli 1612, Blackstone 1758 Book IV Chapter V

[14] Berman 2004-2005, p 15-16, *Legality of the Threat or Use of Nuclear Weapons*: *Advisory Opinion*, para 82, Neff 2005

[15] MacMahon 2010, p 496-497, ICRC Customary International Humanitarian Law Database

[16] Lindroos 2005, p 30

international lawyers to ignore its existence, compared with other sectors which cannot be so easily by-passed. This specialisation has resulted in IHL becoming one of the most highly focused areas of public international law and has hastened its omission from contemporary debate. Indeed, most general public international lawyers (if any truly still exist) would only claim a basic understanding of humanitarian law and, as such, are slower to engage with it than perhaps other sub-genres within the international legal order.[17] While specialisation is also apparent in other areas of public international law, for example investment law, it is particularly acute within IHL. Specialisation also has the reverse effect as international humanitarian lawyers rarely engage with the wider contemporary debate and this has had a significant impact on the development of these debates. This is not intended as a criticism of expertise, which is necessary, but rather an observation which goes towards explaining the peripheral place that IHL occupies within contemporary debates.[18]

Within the international legal order, IHL is the only area whose operation must be triggered before coming into operation. This may occur due to the operation of *jus ad bellum*, the operation of the Security Council or the dissent into violent conflict within a state.[19] As with other specialised sectors within the international legal order, IHL relies on "general" public international law but, arguably, its unique status within international law sets it apart. Several factors, including the extent of its codification, its ancient pedigree and its general acceptance by all states, combine to distinguish it still further.[20] Although human rights law, the law of state responsibility, international criminal law, international environmental law *inter alia*, all have a baring upon IHL, the extent of its remit during armed conflict means that it dominates in a way that no other area of international law appears to do.[21] During periods of non-armed conflict these other areas clamour for room and authority; however during armed conflict humanitarian law comes to the fore and stands above, though not without the presence of, these other aspects of international law.[22]

Unlike other areas of international law, such as human rights or environmental law, the establishment of international law's institutions, whether in the form of the League of Nations, the United Nations, or even the international courts and tribunals, have been of secondary importance to the development of IHL. While the considerable case law of the *ad hoc* tribunals[23] and the International Court of Justice (ICJ) have contributed to the evolution of IHL, they are not the primary drivers behind the development of this body of law. Instead, they have had a major role in the cementing of international criminal law as part of the enforcement mechanisms for both IHL and human rights law.[24] While the role of the ICRC is considerable, states, not institutions, remain the primary promoters of IHL. Its absence from international institutions has meant that IHL is not at the centre of the debate on the international legal order's framework, particularly when institutions are considered central.

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[17] See as an example the relationship between human rights and IHL Provost 2002, p 2-3
[18] Schachter 1995
[19] Sloane 2009
[20] Henckaerts and Doswald-Beck 2009
[21] Dinstein 2005, p 57, Berman 2004-2005
[22] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 266
[23] The ICC will doubtless also contribute, though at this point at least, its case law is limited.
[24] Danner 2006, Kaul 2008

International humanitarian law's isolation manifests itself in several ways. For example, even though it is possibly the ideal candidate for exploring the evolution of self-contained regimes or *lex specialis* rarely, if ever, is it used as an example in general discussions on these topics.[25] Cassese argues that, '[t]he world community swarms with myriad legal orders.'[26] While IHL is clearly a very good example of such a legal order, it has largely remained outside these debates.

The role of IHL in the historical development of self contained regimes and *lex specialis* is rarely considered beyond specific occurrences or disputes. An explanation could be that that the sheer volume of IHL treaty law instils a sense of apprehension into many public international lawyers who do not feel comfortable engaging with a topic so heavily treaty-laden.[27] Second, there is no apparent eagerness to engage in such debates among IHL experts possibly because there is an assumption that IHL has largely settled its relationship with other areas of international law through the development of the doctrine of *lex specialis* and other mechanisms. International courts and tribunals as well as the vast majority of IHL scholars handle the interaction of IHL with other areas of public international law so adroitly that it is possible to argue that a clear, if not always definitive, understanding of their interactions subsists.[28] It might also be claimed that the on-going human rights versus IHL debate (which arguably is not as thorny as is sometimes suggested) takes away from a wider consideration of what the impact of a process of fragmentation or a movement towards constitutionalisation may have upon *lex specialis* or self-contained regimes.[29] This claim is not entirely persuasive since similar arguments apply equally to other genres of international law that are part of contemporary debates; it therefore follows that the justification that IHL constitutes a perfect working order is far from satisfactory.

The exceptionalism of international humanitarian law raises issues for any theory which seeks to outline the possible direction of the international legal order. Nonetheless, the opposite appears to be the case. Indeed, the proliferation of public international law has led to what could be described as the 'splendid isolation' of international humanitarian law as an area apart, but within the discourse of public international law.[30]

3. International Humanitarian Law and International Law

This section examines how the international legal order regulates the interaction of IHL with other areas of international law including general international law. The general rules applied by courts to reconcile differences between areas of law as well as the academic debate surrounding these rules are explored. The aim of this section is to set the broad terms by which IHL interacts with other areas of international law and thus it does not seek to settle when, and under what circumstances, general international law or other sub-genres of

[25] Simma and Pulkowski 2006, p 484-485, 529
[26] Cassese 1990
[27] Dunoff 2000, p 87-88
[28] Moreno-Ocampo 2010, Cassese 1998 and on the quality of Court's analysis Kretzmer 2005
[29] Orakhelashvili 2008, p 162 discusses the role of pre-conceived attitudes in the debate between human rights and IHL as does Cassimatis 2007, p 628-629, Draper 1979, Stephens 2001, p 9-14,
[30] Though this isolation is not related to IHL as a form of law

international law triumph over IHL or vice versa. Three main methods of differentiating between areas of the law, *lex specialis*, self-contained regimes and the hierarchy of norms, are discussed.

The Fragmentation Report of the International Law Commission (ILC) lists four ways by which general international law settles the relationship between it and the various specialised international legal systems.[31] This taxonomy provides a useful foundation to examine how IHL interacts with the rest of the international legal order. The four methods identified by the ILC are: relations between special and general law, relations between prior and subsequent law, relations between laws at different hierarchical levels and relations of law to its normative environment more generally. The first and third group are the most common methods by which IHL interacts with other areas of international law. Given the controversy surrounding such interactions, they will form a focus herein. Although this article will not discuss these relational incidences in detail, the conflicts that do exist in the academic debate illuminate some of the reasons for the isolation of humanitarian law and further aids in discussing the place of humanitarian law within fragmentation and constitutionalisation.

The doctrine of *lex specialis* is probably the most commonly used and well-defined method of interpreting and understanding the relationship between IHL and general international law. As previously noted, IHL was at the core of the historical development of public international law. The well ploughed history of IHL is thoroughly discussed elsewhere and will not be the focus here, rather it is important to stress its historical place within public international law more generally and understand its development as a form of *lex specialis*.[32] The historical absolutist division of the laws of war and laws of peace has been abandoned so that while IHL takes precedence in armed conflicts, '[i]nternational humanitarian law must be applied in context with other principles and provisions of international law'[33] including the rules of treaty interpretation and the laws of state responsibility, as well as the more specific branches of international law.[34]

In circumstances of conflict the question of which law is applicable is resolved by the doctrine of *lex specialis*. Where two areas of law cover the same substantive facts the more specific law trumps its more general counterpart. Importantly, the specific law's application does not imply conflict between the two, both may require the same end, for example, the protection of human life, but if one is more specific on how to achieve this end or is most relevant to the circumstances it is applied. Alternatively, *lex specialis* maybe regarded as merely a tool of interpretation. However, knowing when to apply which law requires more

[31] ILC Fragmentation Report, p 14
[32] Greenwood 2008, p 105-124
[33] Greenwood 2008, p 72
[34] *Lex Specialis* appears in Article 55 of the Draft Articles on State Responsibility and is defined as, 'These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.' These articles operate in a residual fashion, Commentary on Draft Articles p 140, 136. See also European Union Guidelines on promoting compliance with international humanitarian law at para. 12, UN Report Situation of Detainees at Guantanamo Bay, p 10

than a mere requirement of detail.[35] Instead, understanding *lex specialis* as a method of exception enables a clearer view of its operation. Even if general public international law is also applicable, in situations of inconsistency or doubt between two areas of public international law, the area which possesses the more specific detail on the question at hand trumps the other. It is important to not consider this process as adversarial, *lex specialis* is part of the panoply of general international law.

The ILC Report examines several cases from the European Court of Human Rights, the Dispute Settlement Body of the WTO, the Permanent Court of Justice, the European Court of Justice, the International Court of Justice and the Iran-US Claims Tribunal to illustrate the use of *lex specialis*.[36] The application of *lex specialis* in other sectors of international law such as trade, investment and human rights law suggests that it is with regard to IHL that it has most traction as a point of controversy.[37] For example, the International Court of Justice considered the application of general public international law to IHL in several cases, including, most famously the *Nuclear Weapons Case*, *The Wall Case* and *DRC v Uganda*.[38] These cases illustrate how IHL applies within the structure of general international law and while the ILC Report argues that there are difficulties with it, as with most areas of law, these are not necessarily insurmountable.[39]

When *lex specialis* operates is not always obvious. The *Loewen* case states that a normative conflict arises when the express terms of a particular law 'are at variance with the continued operation of the relevant rules of international law.'[40] This variance, however, may not always be evident. The ILC Report suggests two specific difficulties with the application of *lex specialis*. First, it is not necessarily clear what is general and what is a special law and second, that the nature of the relationship of *lex specialis* with other principles of general public international law such as *lex posterior*, normative hierarchies or matters of relevance is not always apparent.[41] This illustrates the inherent problems in setting out *lex specialis* without considering other aspects of general international law, general international law and its interaction with specialised areas as well as specialised areas themselves. Further, *lex specialis* is a necessary part of general international law, for example, in the interpretation of treaties. Arguably, when *lex specialis* is applicable, general international law always subsists, even if it is on the basis that *lex specialis* is itself a rule of general public international law.[42]

The first category in the ILC Report, identifying a special *lex*, is perhaps easier to divine with regard to IHL than in other parts of the international legal order. The effect of *jus ad bellum* and other triggers for its operation makes IHL's special nature more evident than in other

[35] Akehurst 1974-1975 '*lex specialis* is nothing more than a rule of interpretation' p 273
[36] ILC Fragmentation Report, p 33-39
[37] Pauwelyn 2003, p 386-399
[38] *Legality of the Use of Nuclear Weapons in Armed Conflict* [1996] ICJ Reports 66, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Reports 136, *Armed Activities on the Territory of the Congo Democratic Republic of the Congo* v. *Uganda* , [2005] ICJ Reports 168
[39] Greenwood 2008
[40] *The Loewen Group, Inc. and Raymond L. Loewen and United States of America* Award, Case No ARB (AF /98/3 , 26 June 2003, 42 ILM 2003 811, p 837
[41] ILC Fragmentation Report, p 29
[42] Cassimatis 2007, p 631, Lindroos 2005, p31

areas of international law.[43] Unlike trade, environmental, investment and human rights law, which all exist concurrently, IHL must be triggered for the regime to be set in motion and the doctrine of *lex specialis* to be applied. IHL lies dormant until called into force. This differentiation between IHL and other self-contained regimes is significant and central to understanding contemporary debates and the isolation of IHL.

Self-contained regimes and *lex specialis*, though similar, are not interchangeable. The term 'self-contained regime' was first used by the Permanent Court of International Justice in the *S.S. Wimbledon* case to describe a substantive and self-reliant body of law.[44] In contrast, *lex specialis* requires only that a particular law be more detailed on a specific point, including a single treaty. Another difference between the two systems lies in their application. A self-contained regime, by its nature, can operate independent of other regimes. While self-contained regimes rely on general international law much of their operation is internal and particular to the specific legal regime, though not always in splendid isolation. *Lex specialis* operates in situations where both general and specific law, though not necessarily in conflict, deal with the same substantive question.[45] This is apart from situations of competing norms. It is possible for a body of law to be only *lex specialis* or both *lex specialis* and self-contained. Arguably IHL is the latter.

The second method highlighted in the ILC Report is the relationship between *lex specialis* and other norms of international law. Simma argues that, 'a certain degree of hierarchization of international norms cannot be denied.'[46] If the character of the hierarchy is understood and operates effectively this is not in itself problematic, but herein lies the problem.[47] At first glance, normative hierarchies appear the most problematic issue in understanding the relationships between norms and are relevant to the debates on fragmentation, and constitutionalisation. Their interaction is also important in understanding IHL's isolation and the operation of *jus cogens* norms is a prime example of the issues which arise.[48]

Certain *jus cogens* norms such as the prohibition of torture and genocide are also key aspects of IHL. Indeed, IHL uses core norms to maintain the minimum standards as much, if not more, than other areas of international law.[49] Nonetheless, conflicts arise regarding other norms such as immunity or the use of force.[50] This is an issue for IHL, which arguably is in line with *jus cogens* norms, and for other self-contained regimes such as international criminal law and *jus ad bellum*.[51] For example, targeted killings can lead to a conflict

[43] Sandoz 2003, p 11-12
[44] *S.S. Wimbledon*, PCIJ, Ser. A, No. 1, p 23
[45] Akehurst1974-1975, p 273
[46] Simma and Pulkowski 2006, p 496
[47] Paulus 2005
[48] Meron 2000, case law discussing *jus cogens* include, Prosecutor v Delacic, para 454 and Al-Adsani v United Kingdom. The ICJ's approach to *jus* cogens has been somewhat tortuous see, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 266, at para. 79, *Armed Activities on the Territory of the Congo* New Application: 2002 *Dem. Rep. Congo v. Rwanda* , Jurisdiction and Admissibility [2006] ICJ Rep 1, paras 64 and 125. For a good overview of the development of *jus cogens* see Nieto-Navia 2003
[49] Hannikainen 1988, p 606
[50] Gill and Fleck 2010, p 75-77, Linderfalk 2007, p 866
[51] For a discussion on the relationship between international criminal law and IHL law see Kaul 2008

between IHL and particular rights, such as the right not to be arbitrarily deprived of life as a *jus cogens* norm.[52] Whilst, targeted killing is permissible under IHL, its boundaries are strictly defined as states must ensure their use of lethal force meets certain standards which keeps it within the bounds of *jus cogens*. While violations of these standards do occur, when this happens, theoretically at least, IHL combined with international criminal law ensures that enforcement mechanisms are in place. This is not to underplay potential tensions between aspects of IHL and *jus cogens* but rather suggests that international law has mechanisms for resolving these tensions in most situations and that the hierarchical value of *jus cogens* norms plays a key role in resolving such conflicts as they arise.

Questions regarding the interaction of IHL with *lex specialis* and *jus cogens* exist, but international law has developed mechanisms for settling these issues. Yet, such resolutions are dependent on the international legal order as presently understood and are not always successful in settling conflicts satisfactorily. The question remains whether, if a process of constitutionalisation is underway or if fragmentation is occurring, what impact do these processes have upon IHL and the operation of *lex specialis*, self-contained regimes and the hierarchisation of norms. If these are proved to be occurring what is the impact upon IHL? In a fragmentised or constitutionalised system would *lex specialis*, self-contained regimes or hierarchy of norms suffice to rationalise the relationship between IHL and the rest of the international legal order?

4. New International Governance Theories

We now move to consider how IHL interacts with contemporary international legal theory with an emphasis on fragmentation and constitutionalisation. This analysis has two aims, first to understand how these debates deal with IHL and second to understand how IHL can add to and inform both these theories. The section also endeavours to clarify why IHL has all but been excluded from these discussions. Fragmentation and constitutionalisation are chosen as two, not necessarily opposing, but nonetheless divergent perspectives on the future shape of international law. As two distinct developments they should enlighten the varied perspectives on IHL's development within the global legal order. Fragmentation will be considered first, followed by constitutionalisation. They will then be compared in terms of their impact upon IHL.

4.1. Fragmentation

Fragmentation examines two processes within international law. The relationship between general international law and its various specialised areas and the interaction among these specialised areas. Generally, fragmentation centres upon the increasingly independent and ultimately stand-alone systems of international, regional and domestic law that have, particularly over the past 40 years, emerged. Fragmentation focuses on the process by which these sectors are becoming increasingly distinctive and, as such, more divergent from each

[52] Gill and Fleck 2010, p 281, The Human Rights Committee 2001 of the ICCPR recognises the right to life as a *jus cogens* norm

other. The ILC Report defines fragmentation as 'the splitting up of the law into highly specialized "boxes" that claim relative autonomy from each other.'[53] This results in an increasing divergence among and volume of, self-contained regimes within international law.[54] The roots of fragmentation can be observed in the Pre-Charter era and therefore it is not a new development; however, debates regarding the impact of fragmentation upon international law have, of late, gained traction. The multiplicity of subsystems, be they trade, human rights, environmental or most importantly from our perspective, IHL suggest that international law is developing its own variety of *sui generis* systems.[55] The ILC's decision to commission a report on the concept emphasises the importance of giving consideration to the possible ramifications of fragmentation.[56] Interestingly, IHL, though later given consideration, is marked by its absence from the ILC Report's initial list of areas which illustrate the fragmentation process.[57] This section questions whether fragmentation is manifest within IHL law and, if so, what impact IHL has upon fragmentation.

Fragmentation has several features. For example, fragmented sectors of international law are regarded as maintaining areas of overlap with both general international law and other fragmented sectors. Part of fragmentation describes the internal orders developing to meet the particular needs of these sectors of law. These fragmented sectors have an internal, though not necessarily external order and they develop and integrate at different speeds. Reaction to fragmentation is mixed. Observers tend to either see fragmentation positively as international law becoming ever more sophisticated or negatively as evidence of the disintegration of the international legal order.[58] According to its supporters fragmentation is a superior account of the present international legal orders than, for example, claiming the existence of a fully co-ordinated system. Fragmentation seeks to reflect international law as it presently operates; it recognises the complexities of a regime of law which is becoming more and not less intricate.

Lex specialis is often linked to fragmentation; indeed it is a central aspect of the ILC's Report. In the introduction to the Report fragmentation is described as a post World War II phenomena. Indeed, Jenks' key 1953 article on the topic appears to be a favourite starting point for many discussions on the process.[59] But was Jenks a visionary as suggested by Simma, Pulkowski and the ILC Report or, alternatively, could it be argued that IHL was already present as a prime example of a self-contained regime or *lex specialis* which substantiates a claim towards a trend of fragmentation?[60] Arguably, IHL is an early example of the increased specialisation of a particular area of international law which has since been replicated in, among others areas, trade, environmental, human rights and investment law.[61]

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[53] ILC Fragmentation Report, p13-14
[54] Simma 1985, p 112
[55] Mégret 2011, p 226
[56] ILC Fragmentation Report
[57] ILC Fragmentation Report, p 9 and 11
[58] Koskenniemi and Leino 2002, Hafner 2003-2004, Simma 2003-2004, Buffard et al. 2008, Dupuy 1999, Benvenisti and Downs 2007-2008, ILC Fragmentation Report
[59] ILC Fragmentation Report, p 8, Jenks 1953, p 403, Klager 2011, p 91, Simma and Pulkowski 2006, p 485-486, Tzanakópoulos 2011, p 57
[60] Jenks 1953, p 403, Simma and Pulkowski 2006, p 485-486, ILC Fragmentation Report, p 8
[61] For a discussion of the role of fragmentation in investment law see, Klager 2011, p 89-112 and the interactions between trade, environment and human rights see Hafner 2003-2004, p 851-854

Critically, the specialisation or fragmentation of IHL appears to have occurred earlier than in these other areas.

The ILC Report's analysis of the development and place of fragmentation within international law is highly detailed. The Report acknowledges that fragmentation is the continuation of an ongoing process of specialisation and therefore is not necessarily a negative process as it is sometimes presented elsewhere but part of the evolution of international law.[62] Yet, the Report's reflections on IHL are somewhat limited, its first direct reference is not until page 44.

The ILC Report discusses the *Nuclear Weapons Case* and it is here that IHL is first discussed in detail.[63] Arguably, starting the discussion on IHL here automatically sets it as antagonistic to other fragmented sectors and general international law. The Report acknowledges that the ICJ decided that both human rights and IHL law applied in times of war. From a fragmentation perspective, the concurrent subsistence of both IHL and human rights law is crucial. The Report examines the Court's finding that in circumstances of armed conflict, where there is arbitrary deprivation of life, the *lex specialis* applicable is IHL, and suggests that an alternative interpretation is possible. The Report proposes that the judgement sets aside the established practice of the ICCPR which, in such circumstances, would regard human rights as applicable instead of IHL.[64] The Report subsequently suggests that the ICJ decided the case as it did because to have only applied human rights would have been idealistic so the 'Court created a systemic view of the law in which the two sets of rules related to each other as today's reality and tomorrow's promise, with a view to the overriding need to ensure the "survival of a State"'[65]

This interesting interpretation of the *Nuclear Weapons Case* frankly puts IHL law in a strange position within the international legal order and arguably confuses it with *jus ad bellum*. It also highlights some of the reasons why IHL has not traditionally been part of the fragmentation debate. The "scourge of war" is indeed a bad thing, but the rationales for war are the basis of *jus ad bellum* and it is its proper application that is "tomorrow's promise." Suggesting that the ICJ considered IHL to be the *lex specialis* and, as such, a choice resultant from cruel reality appears to ignore how IHL operates. IHL is not dependent upon reality or promise but rather operates to ensure the symmetrical treatment of those engaged in armed conflict. Also, arguing that the Court 'created a systemic view' of the law appears incorrect to the extent that they applied IHL correctly, as *lex specialis* during armed conflict. Besides the IHL reasoning, all law operates in "reality", however much the promise of utopia might appeal.

Instead, the ICJ based their reasoning upon an interpretation of the law as it stands. The "ideal" world with no war would be the product of *jus ad bellum*, among other political developments, and that issue was not before the ICJ. This suggests a bias against IHL, not

[62] ILC Fragmentation Report, p 11
[63] ILC Fragmentation Report, p 44
[64] ILC Fragmentation Report, p 44
[65] ILC Fragmentation Report, p 47- 48

based upon its content, but rather upon the uncomfortable actuality that requires its existence. This is perhaps part of the reason for its isolation.[66] Of course, the opposite, a prejudice against human rights law in favour of IHL, also exists in some quarters.[67] Nonetheless, in arguing that the ICJ was wrong, not on the basis of *lex specialis*, self-contained regimes, hierarchy of norms or indeed on fragmentation, but rather upon an idea of the Court being forced into a conclusion by reality, the Report perhaps missed an opportunity to engage with the possibility of IHL as an interesting example of fragmentation.

Klabbers argues that international and domestic law are quite similar in their approach to fragmentation.[68] Within domestic legal orders discrete areas such as intellectual property and family law rarely interact. Within international law, this is also the case. The converse is also true. In domestic law, there are areas such as contract and company law which frequently brush up against each other and, so too, aspects of international law. Arguably, these distinct areas of law are all specialised. Yet, within domestic law this specialisation does not inevitably lead to fragmentation and arguably this may also be the case within international law. Nonetheless, the need for a central governance order, an issue dealt with by constitutionalisation, becomes evident in taking account of the impact of fragmentation upon the international legal order which has only *lex specialis* and hierarchy of norms to settle any conflict.

An ongoing process of fragmentation, whether a positive or negative possibility, requires some reflection on the rules that already regulate the interactions of the various sections of international law. While, as suggested earlier, the very fact that IHL is triggered by very specific events makes it easier to pinpoint when it trumps other areas of international law, the lack of such a trigger in other sectors may create issues as further fragmentation occurs. In this respect, IHL may provide an example of how to regulate a fragmented legal order. The development of specific rules which establish an area of law's supremacy, be it trade or human rights, modelled upon the relationship between *jus ad bellum* and IHL, offers an additional tool to the international legal order in a fragmented future.

What does this brief overview of fragmentation tell us about IHL? First, IHL, despite potentially being a prime example of fragmentation, is infrequently discussed. Arguably, IHL is such a good example of fragmentation that it is a victim of its own success. As it has become more and more specialised, those involved in the fragmentation debate are less likely to be well versed in IHL. Alternatively, the lack of discussion of IHL could be because the development of self-contained regimes, *lex specialis* and hierarchy of norms combined with the *jus ad bellum* have resolved how IHL interacts with other areas of international law in a systemised fashion. Nonetheless, even though IHL is both self-contained and a *lex specialis*, it forms part of the panoply of international law as one legal order. This is evident in the existence of human rights alongside IHL. Consequently, while IHL is a good example of the issues raised by fragmentation, it also contradicts the notion that a process of fragmentation

[66] For a discussion of some of the complementary elements of human rights and IHL law see Zimmerman 2008, p 764-766, Orakhelashvili 2008, Cassimatis 2007 and on the case Lindroos, 2005, p 42-44
[67] Petrasek 1998, p 560, Draper 1979, Stephens 2001, p 9-14, Cassimatis 2007, p 629
[68] Klabbers et al. 2009, p 11

disrupts international governance and further indicates that fragmentation is a long-running process that perhaps increases the strength of the global legal order.

The dearth of IHL in discussions on fragmentation is a missed opportunity for both. From the IHL perspective, fragmentation presents an opportunity to understand IHL as part of the evolution of the global legal order. From the fragmentation perspective, IHL is an excellent example of the specialisation and operation of a self-contained regime which frequently interacts with other areas of international law. While this brief consideration has raised more issues than it has settled, it does suggest more consideration from both perspectives would be worthwhile.

4.2. Constitutionalisation

International constitutionalisation is a difficult theory to summarise. The many variants and strands within the theory and the lack of agreement within it as to what the constitutionalisation of international law entails makes a neat summation impossible.[69] Constitutionalisation, outside any international characterisation, is a process by which a legal order transitions from a consent based horizontal order to one which is hierarchal and maintains core constitutional norms in its operation. Generally, international constitutionalisation comes in two forms: the first maintains that the entirety of international law is becoming one constitutional order while the second asserts that particular sectors of international law such as trade, or human rights law are in a process of constitutionalisation. Should constitutionalisation proceed, these two variants would have differing effects on IHL. This section questions whether constitutionalisation, in either form would result in change in IHL, how this would be manifested and what impact IHL has or should have upon constitutionalisation.

As with fragmentation, thus far, IHL has not been a focus of international constitutionalisation. Given the dedication of some authors to arguing that sectors such as trade, human rights and most significantly *jus ad bellum* and Security Council's role within it, are going through a process of constitutionalisation, its omission is remarkable.[70] IHL has all but been forgotten, yet arguably it is an important aspect of any domestic or international constitutional order. Even those academics that suggest the entire international legal order is going through a process of constitutionalisation do not tackle the potential issues raised by IHL. Theorists arguing for sectoral constitutionalisation need to consider why IHL is or is not going through such a process and what sets it apart from other sectors which are suggested to be constitutionalising. This section considers what these issues are and suggests some potential methods of understanding them from a constitutional perspective.

IHL already operates within domestic constitutional orders and therefore it is not much of a leap as may first be supposed to establish how IHL and an international constitutionalisation process would interact. Indeed, customary international law ensures that states are bound to

[69] As an example of contrast see single sector constitutionalisation Cass 2005, Petersmann 1999 and world order constitutionalisation Peters 2005, De Wet 2006
[70] Fassbender 2009

follow IHL and therefore even where no formal system is established IHL already subsists within domestic legal orders. Though caution must be exercised, as has been argued by Walker, there is no reason to confine constitutionalism to the domestic realm, exact emulation or transposition is not recommended.[71]

Of central concern is whether IHL is in a process of sectoral constitutionalisation or alternatively does it fit into the pattern of the constitutionalisation of the entire international legal order? Arguably, it is more difficult with IHL (particularly due to its close ties to *jus ad bellum* and international criminal law) to argue for a standalone constitutional order and this is perhaps why, unlike trade or human rights law, there are not any advocates of a sole IHL constitutionalisation process. However, if it is accepted that constitutionalisation can occur in human rights or trade law, there must be robust reasons why this cannot be emulated in IHL. If contented that the entire international legal order is becoming constitutionalised the impact upon IHL should be manifest within these proposals.

Any form of international constitutionalisation requires a re-consideration of the relationship between IHL and other aspects of public international law. In domestic constitutional orders (where IHL law also applies in incidences of armed conflict) probably the closest equivalent are models of accommodation such as martial law or states of siege.[72] As exceptions to normal practice both impact on the normal operation of a constitutional order. Models of accommodation have a long history in domestic legal orders. Roman dictatorship is a very early example of the suspension of constitutional norms to accommodate the necessary means to deal with emergencies.[73] While a constitutional dictatorship may not be an ideal model and is not advocated here, the notion that a constitutional system enables the operation of other laws in times of crisis is important.[74] These crises trigger the suspension of some, though not all, constitutional norms. Arguably a similar model already subsists in international law. The trigger effect of armed conflict upon IHL and the displacement, though not suspension, of other sectors of international law such as human rights provides a comparable model of accommodation.

Generally speaking, for a model of accommodation to come into operation, a trigger is required. A set level of violence or conflict is required before constituted power holders are enabled to decide that martial law, a state of siege or emergency powers are necessary. In the case of martial law in the UK, whenever state activities could no longer function due to a breakdown of order, martial law was imposed.[75] A similar, though not exactly comparable requirement is necessary for states of siege.[76] Other comparable triggers are necessary in domestic law based around declarations of war, which are perhaps closer to Security Council procedures.[77] IHL could develop a similar constitutional trigger mechanism.

[71] Walker 2008
[72] Gross and Ní Aolain 2006, p 17
[73] Gross and Ní Aolain 2006, p 17-26
[74] Watkins 1940
[75] Gross and Ní Aolain 2006, p 30-35
[76] Gross and Ní Aolain 2006, p 26-30
[77] Gross and Ní Aolain 2006, p 17-26

Dicey maintained that the operation of 'martial law' under UK constitutional law maintained public order whatever the cost to property or blood yet this did not mean the total suspension of ordinary law.[78] With regard to IHL the idea that ordinary law persists under martial law is important in an international constitutionalisation process. The separation of the laws of war and of peace no longer survives as both the development of *lex specialis* and the case law of the ICJ suggests. An international constitutionalised order, developing from a basis which would enable the continuation of the current international constitutional order, including those constitutional norms directly linked to human rights once IHL was in operation, would therefore respect traditional constitutional tropes.

States of siege[79] or martial law[80] no longer operate in their original form and largely have been replaced by systems of emergency powers. Nonetheless, the underlying rationale, that in circumstances where conflict reaches a minimum level the constitutional system allows for the suspension of some, though not all, human rights law, is a recognisable re-occurring theme within constitutionalism. Not all domestic constitutional orders explicitly refer to emergency laws; such powers are often set out at other governance levels or within legislation while other states have dual systems for different forms of emergency.[81] Whilst there is no ideal constitutional model of accommodation these states of exception have bled into international human rights as, for example, the European Convention on Human Rights and other rights regimes maintain the possibility of emergencies.[82]

IHL can be rationalised as the equivalent of a model of accommodation in international law. While *jus ad bellum* falls outside the realm of IHL, it is directly linked to it and would also form part of an international model. The proposition that IHL is a model of accommodation has been made by Gross and Ní Aolain quoting Justice Scalia's judgement in the *Hamdi* case. 'Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis - that, at the extremes of military exigency, *inter arma silent leges*.' [83] What makes the proposal here somewhat different is that it is set within international as opposed to domestic constitutionalism. Domestic models of accommodation are not perfect paradigms.[84] Depending on the domestic regime, models of accommodation can continue indefinitely with very low levels violence or conflict which would not meet the "armed conflict" threshold necessary for IHL. Also, from a domestic constitutional perspective, though perhaps more clear-cut in international law, in situations of intrastate conflict where the differences between emergency and IHL are not always evident, differing triggers would have to be maintained in tandem. For those that advocate an existent international constitutional order, this is already established through the monist/dualist system of incorporating international

[78] Dicey 1915, p 280
[79] Gross and Ní Aolain 2006, p 26-30
[80] Martial law is, of the two, closest to the use of military law, though not necessarily IHL law, Gross and Ní Aolain 2006, p 30-35, see also for a historical overview Fairman, 1943 and the work of Dicey, particularly the final 8th edition which was the last volume which Dicey edited
[81] Gross and Ní Aolain refer to Japan, US and Belgium as three examples of constitutions which are silent on explicit powers during emergencies, Gross, Ni Aolain 2006, p 37, 41-43
[82] McGoldrick 2004, p 380 Gross and Ní Aolain
[83] Gross and Ní Aolain 2006, p 326, Hamdi v Rumsfield 2004 542 US 507, p579
[84] Walker 2008

law into domestic legal orders. Nonetheless, in a process of international constitutionalisation with multiple governance levels, reform of the role of constituted powers holders would be required to fully constitutionalise the system already established by *jus ad bellum* and IHL.

Jus ad bellum and IHL are bound together. Other than in instances of Security Council sanctioned actions (which may have to be reformed in any putative constitutionalisation process), a level of armed conflict is required to enable the state to use force to repel an attack and trigger IHL.[85] Naturally, this requires change for both IHL and *jus ad bellum*, although reform of the substantive elements of the minimum threshold of armed conflict is probably unnecessary. The systems for establishing the threshold of armed conflict, by contrast, would probably require reform.

A process of constitutionalisation requires the re-configuration of IHL's interaction with general international law. Constitutionalisation would affect both *lex specialis* and the hierarchy of norms and would incorporate core norms of constitutionalism. This presents two options. First, incorporating what is already occurring into a constitutional regime and, as such, maintaining much of the *status quo*. This, however, presents a quandary. If there is no real need for change then the current order must already be constitutionalised or at the very least be far advanced in the process of constitutionalisation. The second possibility, which presents more complications, but is perhaps more accurate, is that an ongoing process of constitutionalisation will occur which incorporates constitutional norms and moves international law into a more centralised and hierarchical system. Part of this process would be the entrenchment of core constitutional norms such as the rule of law or democratic legitimacy.[86]

While the constitutionalisation debate does not regularly engage with the substantive and procedural differences within constitutionalism a process of constitutionalisation would require that, for example, *lex specialis* be re-configured in terms of constitutional norms or, at least, in terms of a constitutional order. This probably would not impact on the substantive content of IHL but it is quite possible that the conflict between it and other areas of the global constitutional regime would set the terms of settlement differently to the *lex specialis* principle, which currently fulfils this role. Such constitutional reforms could result in more clarity regarding IHL's interactions with other areas of international law, but it may also involve a rebalancing of these relationships.

IHL in an international constitutional order requires a model of accommodation to replace or, at least, alter the operation of *lex specialis* or self contained regimes. One possibility would be to constitutionalise the 'trigger' which already subsists but would, by necessity, require reform building upon the current role of *jus ad bellum* and the processes by which the level of armed conflict necessary for IHL to operate is established. Obviously, such changes to the trigger for IHL would have to be in tandem with the development of a broader constitutional regime within international law which would also establish a firmer rule of law, democratic legitimacy, and rights regime as without these other reforms any model of accommodation

[85] Dinstein 2005, p 175-216, 278-290
[86] Nollkaemper 2009, Wheatley 2010

would be open to abuse by the holders of constituted power by a combination of militarism and *jus ad bellum*. For example, reform of the Charter to ensure its operation within constitutional norms would require reform of both the structure of UN organs and the legal regimes which underpin their decision-making processes.

How much change within the international legal order constitutionalisation requires depends on whether a form of thin or thick constitutionalism takes root.[87] At a minimum, a hierarchy of norms within the international legal order would have to be recognised. Further, all aspects of the inter-relationship between these norms and the various sectors of the international legal order would need to be fully rationalised. Take the hierarchy of norms; within a "thick" constitutional order norms such as the rule of law, democratic legitimacy, human rights and the separation of powers are present and ensure that a hierarchical order is maintained and that the legal system operates on a constitutional basis. Most importantly a constitutional legal order regulates the activities of constituted power holders. Arguably, this falls within the remit of *jus ad bellum*. Nonetheless the scope of IHL's operation is effected by thick constitutionalisation in the same manner as trade, human rights or environmental law.

Some proponents of constitutionalisation argue that *jus cogens* are the core of the process.[88] As IHL already aligns itself with *jus cogens* norms this is not necessarily problematic.[89] If a thick constitutional order is established, containing the norms of constitutionalism such as the rule of law, human rights, democratic legitimacy, separation of powers and the acknowledgement of constituent and constituted power holders, this may require IHL to be better drawn into a centralised international legal order. This may necessitate the establishment of a more consolidated system of control where the disparate domestic systems, international criminal law, the ICRC, among other bodies, are regulated by minimum constitutional standards such as the rule of law and democratic legitimacy. Arguably, at present, these relationships would not meet the standard of constitutional norms. For example, the operation of the ICRC and the International Criminal Court probably would not meet the standards of oversight required within domestic constitutional systems, though this is not necessarily an issue for IHL.

What does the constitutionalisation theory tell us about IHL? As the debate has largely not engaged with IHL, it is difficult to establish how it would fit into a new international constitutional order or indeed into a process of constitutionalisation. As discussed, there are several possible outcomes based around the trigger for IHL's operation and its place within a constitutional hierarchy of norms. IHL's operation points to the existence of a crisis which an international constitutional order must regulate. This makes IHL's omission from the constitutionalisation debate all the more surprising. Any international constitutional order that cannot effectively tackle armed conflict arguably does not possess the elements necessarily to truly be described as constitutional.

[87] Walker 2008, p 526, 537
[88] De Wet 2006, Fassbender 2009, Peters 2006
[89] Greenwood 2008, p 39

5. Conclusion

Contemporary debates on international law largely ignore IHL. This is to the detriment of both international legal theory and IHL. By tackling one of humanity's ever-present negative conditions, war, IHL is an essential aspect of international law, The ICJ recognised this in the *Nuclear Weapons Case*;

> It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' as the Court put it in its Judgment of 9 April 1949 in the *Corfu Channel* case (*I.C.J. Reports 1949*, p. 22), that The Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.[90]

No scholar or state contends that IHL is an entirely detached regime of law. General international law, human rights law, law of state responsibility, environmental law, diplomatic law, trade law all interact with IHL. As discussed at the outset, mechanisms such as *lex specialis* and hierarchy of norms enables IHL to subsist and interact with general and specific aspects of international law. Yet, IHL remains aloof from the debates on the future shape of public international law, in particular, fragmentation and constitutionalisation. This article has sought to articulate why this is the case and further what implications both debates could have on IHL.

Its highly specialised character has meant that most general international lawyers are unwilling to engage with the complexities of IHL. In contrast to continuously operating sectors of international law, IHL is so closely associated with *jus ad bellum* that it is only in exceptional circumstances that non-specialists must deal with the field. The eternal debate between IHL and human rights law, which sets an antagonistic tone between IHL as exceptional and other aspects of international law also contributes to this isolation. It could be argued that neither fragmentation nor constitutionalisation processes cause difficulties for IHL. Since IHL is perhaps a prime example of fragmentation its parameters are already understood and set. If IHL is not affected beyond the hierarchical value of *jus cogens* norms, the constitutionalisation debate is irrelevant. Yet, these claims do not stand up to examination. Fragmentation will probably lead to a further entrenchment of law as it is presently understood but not without the further development of *lex specialis*, self contained regimes and a hierarchy of norms to further optimise its operation. Constitutionalisation may not change the substantive content of IHL but it will require fundamental shifts in our broader understanding of the international legal order's operation. The need for a discussion of a model of accommodation further emphasises the need to reconsider the relationship of IHL to the trigger for its operation in a constitutional system.

[90] *Legality of the Threat or Use of Nuclear Weapons*: *Advisory Opinion*, para 79

Both fragmentation and constitutionalisation deal with the entire international legal order. As such, IHL's absence raises questions. Arguably, until both theories address these issues, neither can be wholly endorsed. While IHL's specialisation has made its isolation more acute, this makes its inclusion in these debates all the more pressing. If the international legal order is evolving beyond its traditional parameters then understanding the role of IHL amidst these changes is important. To allow IHL to remain in splendid isolation prevents these contemporary debates from fully realising their potential to shape the future development of international law.

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